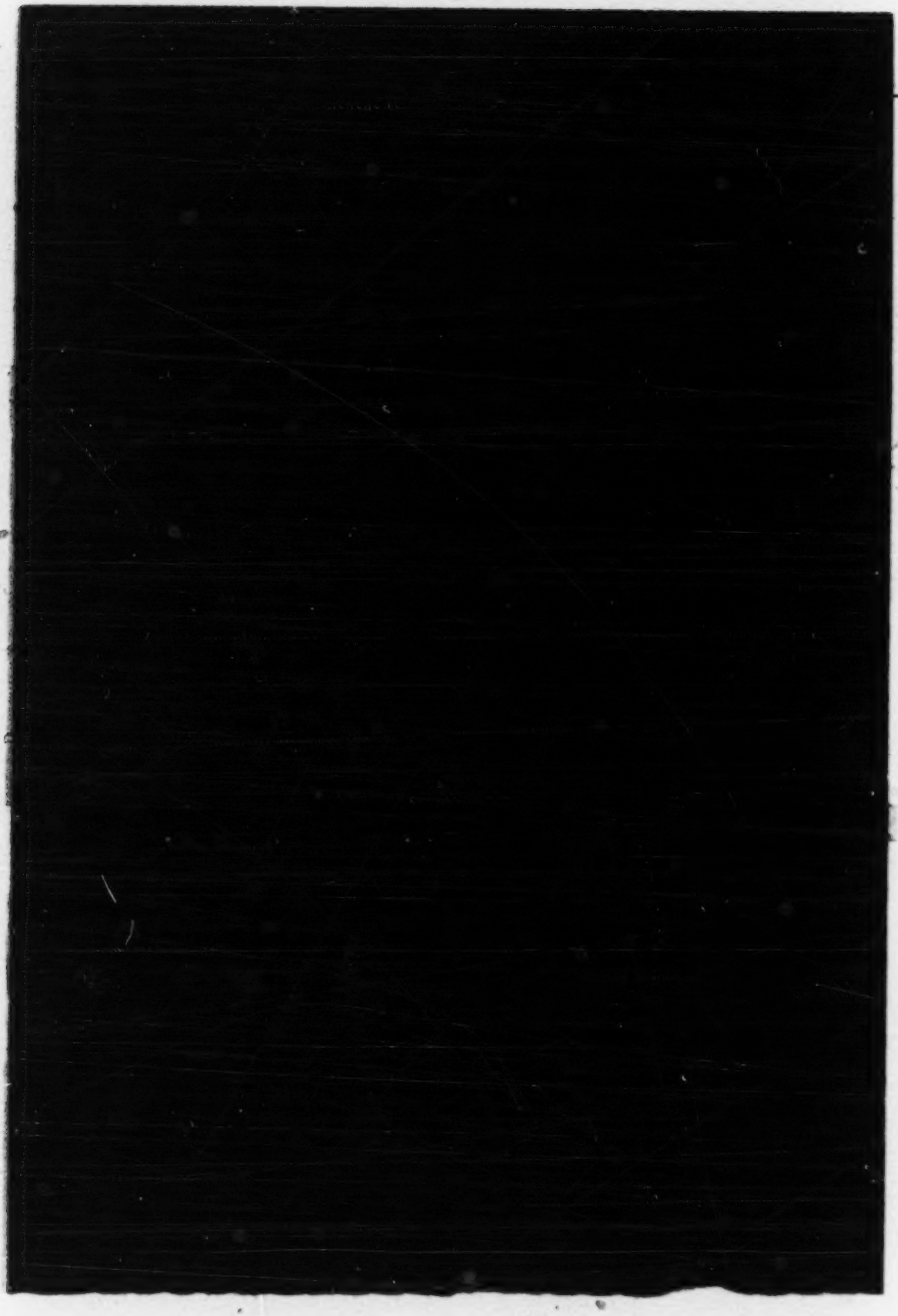

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 93

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL J. KOENIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In its brief-in-chief, the government contended that the order of the district court in this case granting a motion to suppress, entered in a district other than the district of trial, is a part of the criminal proceeding and was therefore not appealable. We further contended that such an order is not *res judicata* as to the admission of evidence at the criminal trial. Respondent, while agreeing with the government that the order is not appealable and is not *res judicata,* claims that it is nevertheless binding on the trial court. We reemphasize, however, that an order issued in the district of trial may be reconsidered by the trial court, and that if an order issued in the district of seizure is, as we contend, merely a decision on a motion made in the criminal case, then it too must be subject to recon-

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sideration by the trial court. On the other hand, if the trial court were held to be bound by the order issued in the district of seizure, we submit that it would have to be because that order is deemed to be a final decision made in an independent proceeding. Such a final decision would necessarily also be appealable.

1. In addition to the authorities cited in the government's original brief (pp. 31–33), we believe that this Court's decision in *Carroll* v. *United States*, 354 U.S. 394, strongly supports our contention that a non-appealable order on a motion to suppress which is considered part of the criminal case can be reconsidered by the trial court. The defendant in *Carroll* contended that the court of appeals had no jurisdiction to hear an appeal from an order *granting* a post-indictment motion to suppress because, under *Cogen* v. *United States*, 278 U.S. 221, it would have had no jurisdiction to hear an appeal from an order denying the motion. In answer to this argument, the government pointed to the rule relied on by respondent in this case, the provision of Rule 41(e) of the Federal Rules of Criminal Procedure that "[i]f the motion is granted the property * * * shall not be admissible in evidence at any hearing or trial." The government maintained that this language meant that while a defendant could obtain reconsideration of an adverse pre-trial ruling by renewing his motion when the evidence was offered during the trial, the government could not obtain reconsideration of an order granting a motion to suppress. We then stated that the *Cogen* holding

was based on the premise that an order denying the motion could be reconsidered by the trial court (see 278 U.S. at 224). We therefore concluded that the grant of a motion to suppress filed prior to trial was fundamentally different from a denial and hence that different considerations should apply: in short, that a denial is interlocutory "because it does not necessarily settle the question of evidentiary admissibility," while a grant settles the question and hence is independent, plenary, and final. Brief for the United States, No. 571, Oct. Term, 1956, pp. 48–50.

This Court answered the government's argument by saying (354 U.S. 404):

> But a motion made by a defendant after indictment and in the district of trial has none of the aspects of independence just noted, as the Court held in *Cogen* v. *United States*, 278 U.S. 221. As the opinion by Mr. Justice Brandeis explains, the denial of a pre-trial motion in this posture is interlocutory in form *and real effect*, and thus not appealable at the instance of the defendant. *We think the granting of such a motion also has an interlocutory character*, and therefore cannot be the subject of an appeal by the Government. [Emphasis added.]

The explanation by Mr. Justice Brandeis in *Cogen*, to which the Court referred, was as follows (278 U.S. at 224):

> It is not true that the decision on such a motion for the return of papers necessarily settles the question of their admissibility in evidence.

> If the motion is denied, the objection to the admissibility as evidence is usually renewed when the paper is offered at the trial. *And, although the preliminary motion was denied, the objection made at the trial to the admission of the evidence may be sustained.* For as was said in *Gouled* v. *United States*, 255 U.S. 298, 312–313: "* * * where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial."[1] [Emphasis added.]

When the Court said in *Carroll* that the denial of the motion "is interlocutory in * * * real effect" for the reasons given by Mr. Justice Brandeis in *Cogen*, and then added immediately afterward that "[w]e think the granting of such a motion also has an interlocutory character," it held, in effect, that the government had misread Rule 41(e) and erroneously deduced that the grant of a motion cannot be reconsidered. Thus, in *Carroll* this Court applied the *Cogen* standard for determining whether orders *denying* motions to suppress are interlocutory to orders *granting* motions to suppress, and held that the latter are as susceptible to reconsideration by the trial court as are orders denying such motions.

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[1] We discuss the *Gouled* case at pp. 31–32 of our original brief.

2. While respondent admits that the order of suppression is not *res judicata,* he claims that it is nevertheless binding on the trial court. He bases this contention on principles of comity and coordinate jurisdiction. We submit, however, that the same cases and reasons which demonstrate that an order granting a motion to suppress are not binding on *res judicata* grounds likewise show that such an order is not binding on the basis of any other principle. Moreover, since the principles of comity and coordinate jurisdiction apply equally to reconsideration of orders denying motions to suppress and to orders granting such motions, respondent's contention would also mean that the denial of a motion to suppress could not be reconsidered by the trial court. It is well established, however, that the trial court can exclude evidence because it was illegally seized even though a motion to suppress was denied before trial. *E.g., Cogen* v. *United States, supra; Gouled* v. *United States, supra.*

In addition, we submit that respondent has misconstrued the effect of the principles of comity and coordinate jurisdiction; unlike *res judicata,* they do not absolutely prevent reconsideration of the decision by another court. Ordinarily, of course, a district judge will follow the earlier decision of another district judge in the same case. But the doctrines of comity, coordinate jurisdiction, and law of the case do not require that the earlier decision be followed in every situation. At the least, a district court can properly exercise its discretion to reconsider an earlier decision either in the same district or in another

district if important new evidence is offered, the applicable law has changed, the earlier decision was clearly erroneous, or comparable circumstances exist.

The federal courts have uniformly refused to consider earlier decisions in the same criminal case as absolutely binding. For example, in *Messenger* v. *Anderson*, 225 U.S. 436, 444, Mr. Justice Holmes stated that "law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."[2] Similarly, in *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131 (C.A. 2), in an opinion by Judge Learned Hand, the court of appeals held that the trial court had discretion to reconsider an order denying a pre-trial motion for summary judgment. Accord, *Castner* v. *First National Bank of Anchorage*, 268 F. 2d 376 (C.A. 9). Even in the Third Circuit, where the "co-ordinate jurisdiction" rule is most strongly maintained, reconsideration by one judge of an order issued by another judge is permitted in exceptional circumstances such as the unavailability of the judge who made the original decision because of death, resignation, or termination of a temporary assignment (see *TCF Film Corp.* v.

[2] Although Mr. Justice Holmes was considering the effect of an earlier court of appeals decision on a subsequent appeal in the same case there is no substantial difference between that situation and the one where a district judge must determine the effect of an earlier district court decision. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131, 136 (C.A. 2).

Gourley, 240 F. 2d 711, 714 (C.A. 3),[3] or the presentation of new evidence (see *United States* v. *Wheeler*, 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873).

Respectfully submitted.

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JANUARY, 1962.

[3] Under the decision in *Gourley*, it would appear that the order of the district court in this case could be reconsidered by the trial court. The court of appeals held in *Gourley* that an order could be reconsidered by another judge if the temporary assignment of the judge who issued it had terminated and he had left the district. Here, the Florida district court had jurisdiction over the Ohio criminal case only to the extent of hearing and deciding the motion to suppress. Once that decision was made, the Florida court's "assignment" to the case was terminated, and all aspects of the case were returned to Ohio. The Florida court was therefore as "unavailable" for considering an application for rehearing as was the judge in *Gourley* whose assignment had terminated.

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